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**IN THE
COURT OF APPEALS OF INDIANA**

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February 26, 2009

BAKER, Chief Judge

Appellant-petitioner Derrick D. Clark appeals the denial of his post-conviction relief, arguing that the post-conviction court erroneously concluded that he did not receive the ineffective assistance of trial and appellate counsel. Finding no error, we affirm.

FACTS

The underlying facts, as set forth in Clark's direct appeal, are as follows:

Jeff Phillips lived with his fiancée, Kimberly Hester at the Courtyard Apartments in Anderson, Indiana. Between 10 and 11 p.m. on April 11, 2001, Hester reported to Phillips that two people were loitering in the parking lot near Phillips's car, and one of them was sitting on the car. Phillips went outside, and after a brief exchange one loiterer returned to a group about twenty to twenty-five feet away and the second drove off. Clark, who was among the group, then approached Phillips, and an argument broke out. After a brief exchange Phillips returned to his apartment, and Clark retrieved his hooded jacket from the woman who had been holding it and told the group to go inside the apartment building.

After Phillips had turned off most of the lights in the apartment, Phillips and Hester peeked out of their bedroom window. Phillips saw someone with a hood approach their apartment building and fire three shots into the apartment. One of the bullets struck Hester and she died a short time later. Clark was identified as the shooter by one member of the group. Two other witnesses, an adult and a nine-year-old boy, also implicated Clark in the shooting, and Clark confessed to the shooting in police interviews under circumstances set forth below.

Clark was charged with the Murder of Hester, Attempted Murder of Phillips, and handgun violations. The State requested that Clark be sentenced to life without parole based on the charge that he discharged a firearm into a residence. The jury found Clark guilty of Murder, Attempted Murder, and Carrying a Handgun Without a License. The jury recommended a sentence of life without parole, and the court imposed that sentence.

Clark v. State, 808 N.E.2d 1183, 1187-88 (Ind. 2004) (footnote omitted). In his direct appeal, Clark contested the admissibility of certain statements he made to police, the admissibility of a witness's statement. He also argued that his sentence was inappropriate, based on an improper consideration of aggravators and mitigators, and based on an unconstitutional statute. Our Supreme Court held that the trial court's sentencing order did not comply with statutory requirements and remanded for a corrected sentencing order; in all other respects, the Clark court affirmed the trial court. Id. at 1196-97.

On July 13, 2005, Clark filed a petition for post-conviction relief, arguing that he had received the ineffective assistance of trial and appellate counsel. On May 7, 2008, the post-conviction court denied Clark's petition. Clark now appeals.

DISCUSSION AND DECISION

I. Standard of Review

The petitioner in a post-conviction proceeding bears the burden of establishing grounds for relief by a preponderance of the evidence. Ind. Post-Conviction Rule 1(5); McCarty v. State, 802 N.E.2d 959, 962 (Ind. Ct. App. 2004), trans. denied. When appealing from the denial of post-conviction relief, the petitioner stands in the position of one appealing from a negative judgment. Id. On review, we will not reverse the judgment unless the evidence as a whole unerringly and unmistakably leads to a conclusion opposite that reached by the post-conviction court. Id. Post-conviction

procedures do not afford petitioners with a “super appeal.” Richardson v. State, 800 N.E.2d 639, 643 (Ind. Ct. App. 2003). Rather, they create a narrow remedy for subsequent collateral challenges to convictions that must be based upon grounds enumerated in the post-conviction rules. Id.; see also P-C.R. 1(1).

II. Trial Counsel

When evaluating a claim of ineffective assistance of counsel, we apply the two-part test articulated in Strickland v. Washington, 466 U.S. 668 (1984). Pinkins v. State, 799 N.E.2d 1079, 1093 (Ind. Ct. App. 2003). First, the defendant must show that counsel’s performance was deficient. Strickland, 466 U.S. at 687. This requires a showing that counsel’s representation fell below an objective standard of reasonableness and that the errors were so serious that they resulted in a denial of the right to counsel guaranteed to the defendant by the Sixth and Fourteenth Amendments. Id. at 687-88. Second, the defendant must show that the deficient performance resulted in prejudice. Id. To establish prejudice, a defendant must show that there is a reasonable probability that but for counsel’s unprofessional errors, the result of the proceeding would have been different. Id. at 694. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Id.

We will not lightly speculate as to what may or may not have been an advantageous trial strategy, as counsel should be given deference in choosing a trial strategy that, at the time and under the circumstances, seems best. Whitener v. State, 696 N.E.2d 40, 42 (Ind. 1998). If a claim of ineffective assistance can be disposed of by

analyzing the prejudice prong alone, we will do so. Wentz v. State, 766 N.E.2d 351, 360 (Ind. 2002).

A. Pretrial Investigation and Discovery

Clark first argues that his trial counsel's pretrial discovery and "investigation of the facts of the case were below the prevailing professional norms." Appellant's Br. p. 13. Our Supreme Court has commented that a petitioner who alleges that his trial counsel failed to conduct an adequate investigation of issues must show "what additional information may have been garnered from further consultation or investigation and how that additional information would have aided in the preparation of the case." Coleman v. State, 694 N.E.2d 269, 274 (Ind. 1998). Clark's brief makes absolutely no reference to any facts that were overlooked or underdeveloped by his trial attorney, nor does he explain how discovery was conducted deficiently.

The record reveals that Clark's attorney obtained a manual from the Public Defender's Council regarding the defense of cases involving the possibility of life without parole (LWOP). He deposed the State's chief investigator and reviewed all of the State's discovery materials. Inasmuch as Clark had admitted that he fired the shots into the window that killed the victim, Clark's attorney did not believe that the statements made by the State's eyewitnesses required additional investigation. Thus, trial counsel decided that the thrust of the defense would be to suppress Clark's confession. This was a reasonable trial strategy, and Clark has failed to establish that his trial counsel was in any way deficient in the way he conducted pretrial discovery and investigation.

B. Watson's Testimony

Clark next argues that his trial counsel was ineffective for failing to recall a witness and cross-examine him about a prior sworn statement. A few days after the shooting, Michael Watson gave a statement under oath, stating “that he was at the Courtyard apartments with Clark and others when Clark got into an argument with Phillips and told everyone to go inside. Shortly after that, Watson heard shots.” Clark, 808 N.E.2d at 1188. At trial, Watson's version of events changed:

Watson asserted that he did not remember being at the scene and did not recall whether anyone else was there. The State then asked Watson to read the transcript from his interview, and Watson testified that nothing in it was true. The prosecutor then asked Watson if specific statements in his interview were lies, and Watson said they were. The prosecutor said, “And you're telling this jury under oath here today that everything in here that you've said about Derrick Clark was a lie?” Clark unsuccessfully objected to this line of questioning as an effort to get Watson's prior statements before the jury as impeachment without Watson's having made any inconsistent statements.

Id. At the conclusion of the State's direct examination of Watson, Clark's attorney chose not to cross-examine him because trial counsel believed that Watson's mere presence in the courtroom was harmful to Clark. The State later offered Watson's previous statement as an exhibit, which the trial court admitted over trial counsel's objection.

Clark argues that his trial attorney was ineffective for failing to recall Watson and cross-examine him about the prior sworn statement. Initially, we note that Clark's attorney made a strategic decision that Watson's mere presence in the courtroom was harmful to Clark, and we see no reason to second-guess that decision.

Moreover, Clark has not established what Watson would have said under cross-examination. We are left to guess what Watson would have said, which we cannot and will not do. See Callahan v. State, 527 N.E.2d 1133, 1139-40 (holding that mere speculation cannot lead to reversal under a claim of ineffective assistance of counsel).

Furthermore, we note that two other witnesses testified that Clark argued with Phillips on the night in question, that Clark told them to go inside after the argument was over, and that they heard three gunshots once inside the building. Tr. p. 419-40, 422-23, 438-39, 442-44. Most compelling, Clark confessed that he discharged a gun into the window. Therefore, Watson's statement was cumulative of other testimony. Under these circumstances, Clark has failed to establish prejudice as a result of his attorney's decision to refrain from cross-examining Watson.

C. Clark's Defense

Next, Clark insists that his attorney "failed to develop any plausible defense" to present to a jury. Appellant's Br. p. 14. We cannot agree. Clark's attorney first attempted to suppress his client's confession. When that attempt failed, he tried to "convince the jury that Mr. Clark was guilty of something other than murder," PCR tr. p. 53-54, arguing that the shooting was a reckless act committed in the heat of the fight with Phillips. He also requested and received jury instructions on reckless homicide and voluntary manslaughter. It is evident, therefore, that Clark's attorney presented the best, most effective defense he was able to build given his client's confession to firing the weapon into the apartment. Under these circumstances, we find that Clark's attorney was

not ineffective for failing to build a plausible defense. See Overstreet v. State, 877 N.E.2d 144, 154 (Ind. 2007) (holding that “[t]he choice of defenses for trial is a matter of trial strategy”).

To the extent that Clark seems to argue that his attorney should have included an alleged mental defect as a part of his defense, we observe that even the mental health expert presented by Clark at the post-conviction hearing was unwilling to testify that Clark lacked the mental capacity to commit murder. PCR Tr. p. 111 (testifying that Clark “knew what he had done was wrong and wanted to not be identified by police for it which would be relative to the issue of insanity”). Thus, there is simply no evidence in the record supporting a contention that Clark’s trial attorney should have presented diminished capacity as a defense at trial.

D. Involuntary Manslaughter Instruction

Next, Clark contends that his trial counsel was ineffective for failing to request a jury instruction on involuntary manslaughter. Clark argues that involuntary manslaughter is a lesser included offense of murder. We cannot agree. It is well established that “involuntary manslaughter is not an inherently included lesser offense of murder.” Roberts v. State, 894 N.E.2d 1018, 1029 (Ind. Ct. App. 2008), trans. denied.

Even if it is not inherently included, it is possible for the lesser offense to be factually included in the charged offense under specific circumstances. Wright v. State, 658 N.E.2d 563, 566-67 (Ind. 1995). A factually included offense is found when the

charging information alleges that the means used to commit the crime charged include all of the alleged lesser included offense. Id. at 567.

Here, the charging information alleges that Clark “knowingly or intentionally kill[ed] another human being . . . by firing a handgun multiple times into the window at which [the victim] was standing.” Appellant’s App. p. 20. Involuntary manslaughter occurs when a person kills another human being while committing or attempting to commit a class C or class D felony, a class A misdemeanor that inherently poses a risk of serious bodily injury, or battery. Ind. Code § 35-42-1-4(c). The charging information in this case says nothing about a killing in the course of a dangerous felony, misdemeanor, or battery; therefore, involuntary manslaughter was not a factually included offense in this case. See White v. State, 849 N.E.2d 735, 739 (Ind. Ct. App. 2006) (observing that “the State may foreclose instruction on a lesser offense that is not inherently included in the crime charged by omitting from a charging instrument factual allegations sufficient to charge the lesser offense”). Because involuntary manslaughter was neither inherently nor factually included in the charged offense, the trial court could not have given a jury instruction on involuntary manslaughter. Thus, Clark’s trial attorney was not ineffective for failing to request such an instruction.

E. Preparation for Sentencing

Clark next contends that his trial attorney was ineffective because he allegedly failed to prepare for the sentencing hearing. The record reveals that counsel interviewed a number of witnesses who knew Clark personally, approximately four of whom testified

at the hearing. Counsel hoped to “humaniz[e]” Clark for the jury, showing “some of the things he was interested in, some of the positive things that [Clark] had done in his life.” PCR Tr. p. 44. Counsel also reviewed the portion of the Public Defender’s Council’s manual on LWOP cases that covered the sentencing phase of LWOP trials. Id. at 46.

Clark’s attorney did not, however, have his client’s mental health evaluated, something that he admitted at the post-conviction hearing that he “should have” done. Id. at 45. At the post-conviction hearing, Clark presented testimony from a forensic psychologist, Dr. Jeffrey Wendt, who had recently evaluated Clark. Dr. Wendt concluded that Clark was suffering from acute stress disorder at the time of the shooting, stemming from an occurrence nineteen days earlier in which Clark’s childhood friend had been shot and killed.

Acute stress disorder caused Clark to be armed with a weapon and increased his desire to preserve his personal safety. Preservation of safety, however, did not cause Clark to fire three shots into the apartment. Indeed, Dr. Wendt testified that he believed Clark fired the weapon because of a combination of intoxication, a desire to avoid the emotional stress of what had occurred to him in the past, and “not want[ing] to appear weak or afraid” in front of his friends. Id. at 107. And as noted above, Dr. Wendt testified that even though Clark was suffering from acute stress disorder at the time of the offenses, he was able to form the requisite intent to commit murder. Indeed, immediately after firing the gun, Clark left the scene, went to a friend’s house, and changed clothes, showing that he understood that what he had done was wrong and hoped to avoid police

detection. Under these circumstances, we cannot conclude that evidence of Clark's mental health would have reduced his culpability or led to a mitigation of his sentence. Therefore, Clark has failed to establish prejudice and this argument must fail.

F. Victim Impact Evidence

Finally, Clark argues that his trial counsel was ineffective for failing to object more quickly to victim impact evidence introduced during the sentencing phase of the trial. Victim impact testimony is not admissible in the sentencing phase of a trial if that testimony is irrelevant to the alleged aggravating factors. Bivins v. State, 642 N.E.2d 928, 956-57 (Ind. 1994).

At the time of Clark's trial, sentencing on LWOP cases took place in two phases. The first phase was conducted in front of the jury, which evaluated the charged aggravators. If the jury determined that the charged aggravators existed, then it could recommend to the trial court a sentence of LWOP. Ind. Code § 35-50-2-9(e) (2002). The second phase was then conducted by the trial court, which made a final sentencing determination after considering the jury's recommendation. Id.

Here, in the first phase before the jury, the State alleged one aggravating circumstance—that Clark had intentionally discharged a firearm into an inhabited dwelling. I.C. § 35-50-2-9(b)(15)(A) (2002). During that sentencing phase, the State presented no witnesses and rested. Therefore, there was no victim impact evidence presented to the jury and it can be said with certainty that the victim impact evidence at issue herein had no bearing on the jury's LWOP recommendation.

In the second phase, which took place out of the presence of the jury, the State called the victim's aunt as a witness. During her testimony, she briefly mentioned the cost of the victim's burial and that the victim's sister had taken guardianship of the victim's child. Trial Tr. p. 987-88, 991. Clark's attorney then objected to further victim impact testimony, and the trial court sustained the objection. Clark insists that his attorney should have requested a mistrial and asked that the testimony be struck from the record.

There is a presumption "that a court in any proceeding that is tried before the bench rather than before a jury 'renders its decision solely on the basis of relevant and probative evidence.' The same is true of a sentencing hearing." Veal v. State, 784 N.E.2d 490, 493 (Ind. 2003) (quoting Coleman v. State, 558 N.E.2d 1059, 1062 (Ind. 1990)). As in Veal, Clark was sentenced for crimes other than murder, including attempted murder and carrying a handgun without a license, for which victim impact testimony could be admitted. Also as in Veal, we presume that the trial court could separate what was admissible for one charge from what was inadmissible for another. Under these circumstances, we do not find Clark's trial counsel ineffective based on the limited victim impact testimony heard by the trial court.

III. Appellate Counsel

Clark next argues that he received the ineffective assistance of appellate counsel for a failure to raise a number of issues in his direct appeal. Claims of ineffective assistance of appellate counsel are reviewed using the same standard applicable to claims

of trial counsel ineffectiveness. Bieghler v. State, 690 N.E.2d 188, 193 (Ind. 1997). These claims generally fall into three categories: (1) denying access to the appeal, (2) waiver of issues, and (3) failure to present issues well. Id. at 193-95. The decision of what issue or issues to raise on appeal is one of the most important strategic decisions made by appellate counsel. Id. at 193. Thus, ineffectiveness is rarely found when the issue is the failure to raise a claim on direct appeal. Id.

To show that counsel was deficient for failing to raise an issue on direct appeal, i.e., waiving the issue, the defendant must overcome the strongest presumption of adequate assistance, and judicial scrutiny is highly deferential. Ben-Yisrayl v. State, 738 N.E.2d 253, 261 (Ind. 2000), cert. denied, 534 U.S. 1164 (2002). In evaluating the performance prong of appellate counsel's performance, we consider whether the unraised issues are significant and obvious from the record and whether the unraised issues are "clearly stronger" than the issues that were presented. Bieghler, 690 N.E.2d at 194. If that analysis demonstrates deficient performance by counsel, the court then examines whether "the issues which . . . appellate counsel failed to raise, would have been clearly more likely to result in reversal or an order for a new trial." Id.

A. Prosecutorial Misconduct

Clark first argues that his appellate counsel should have raised alleged prosecutorial misconduct as an issue on appeal. Initially, we observe that any prosecutorial misconduct claim would have been waived, inasmuch as no objections were raised to the alleged conduct. See Reynolds v. State, 797 N.E.2d 864, 868 (Ind. Ct. App.

2003) (holding that a prosecutorial misconduct claim is waived when the defendant “fails to immediately object, request an admonishment, and then move for mistrial”). We cannot fault appellate counsel for failing to pursue a waived claim of error.

To the extent that Clark insists a claim of fundamental error should have been made, we observe that Clark has not informed this court which statements, specifically, made by the prosecuting attorney should be considered so egregious that they amount to fundamental error. See Wentz v. State, 766 N.E.2d 351, 357 (Ind. 2002) (holding that, “[f]or the fundamental error doctrine to apply, [this court] must find the alleged error so prejudiced the defendant’s rights as to make a fair trial impossible”). It cannot be determined from Clark’s brief exactly what the prosecutor’s comments were that amounted to misconduct. Moreover, given the overwhelming evidence of guilt—including Clark’s own confession—it is difficult to imagine how a comment appearing on one page of a very lengthy jury trial could have placed Clark in a position of grave peril. Under these circumstances, we do not find that appellate counsel was ineffective for failing to raise this issue.

B. Sufficiency of the Evidence

Clark next argues that appellate counsel should have argued that there was insufficient evidence supporting his murder conviction. Evidence supporting a conviction is sufficient if an inference may reasonably be drawn from it to support the verdict. Drane v. State, 867 N.E.2d 144, 147 (Ind. 2007). Our Supreme Court “has . . . repeatedly upheld convictions for murder and attempted murder where the State

sought to carry its burden of proof on the issue of intent by producing evidence that the defendant fired a gun in a crowd or at a group of people.” Labelle v. State, 550 N.E.2d 752, 754-55 (Ind. 1990). Here, Clark confessed to firing a loaded gun into an apartment he knew to be occupied and his confession was corroborated by at least two witnesses. As in Labelle, it must be supposed that the shooter intends the consequences of his acts. Given these circumstances, we cannot conclude that this issue was significant, obvious, and stronger than the issues that were raised. Thus, we do not find that Clark’s appellate counsel was ineffective on this basis.

C. Jury Instruction

Clark also argues that appellate counsel was ineffective for “failing to argue for a reckless homicide” jury instruction. Appellant’s Br. p. 26. The trial court did, however, instruct the jury on reckless homicide. Later in the same section, Clark moves from reckless homicide to involuntary manslaughter, arguing that appellate counsel should have argued that the jury should have been instructed on involuntary manslaughter. Id. at 27. As noted above, however, Clark was entitled to no such instruction, inasmuch as involuntary manslaughter is neither inherently nor factually included in the charged offense of murder. Thus, this claim of ineffective assistance must fail.

D. Victim Impact Testimony

Finally, Clark argues that his appellate counsel should have raised the issue of the brief victim impact testimony heard by the trial court in the second phase of sentencing.

As noted above, this claim is without merit, and we do not find Clark's appellate counsel to have been ineffective on this basis.

At the post-conviction hearing, appellate counsel testified that he chose to focus on claims surrounding the suppression of Clark's confession. This is certainly a reasonable strategy, given that the admission was extremely damaging to the defense. We will not second-guess this strategic decision and do not find that Clark's appellate counsel was ineffective.

The judgment of the post-conviction court is affirmed.

NAJAM, J., and KIRSCH, J., concur.